

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

<b>In re:</b>	)	
	)	
<b>DWIGHT DALE BAIR,</b>	)	<b>Case No. 01-14458</b>
	)	<b>Chapter 7</b>
<b>Debtor.</b>	)	
_____	)	
	)	
<b>THE ROXBURY BANK,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Adversary No. 02-5081</b>
	)	
<b>DALE BAIR, DWIGHT DALE BAIR</b>	)	
<b>AND LORI LYNN BAIR.</b>	)	
	)	
<b>Defendants.</b>	)	
_____	)	

**MEMORANDUM AND ORDER GRANTING MOTION FOR  
PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT DALE BAIR**

This matter is before the Court on Roxbury Bank’s Motion for Partial Summary Judgment Against Defendant Dale Bair (Doc. 31). Upon reviewing the pleadings filed by the parties and the law governing this case, the Court is ready to rule. The Court has jurisdiction to hear this matter.<sup>1</sup>

**I. STATEMENT OF FACTS**

The following facts are either uncontroverted, or viewed in the light most favorable to the Defendant, Dale Bair, as the non-moving party. Dwight Dale Bair (hereinafter “Dwight Bair”) filed a petition seeking relief under Chapter 12 of the Bankruptcy Code on September 14, 2001. Dale Bair, his

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<sup>1</sup> 28 U.S.C. § 157(b)(2)(K) (core proceeding).

father, was listed as a nonpriority unsecured creditor on Schedule F, and would thus have received notice of the filing. On February 1, 2002, the case was converted to one under Chapter 7 of the Bankruptcy Code.

The Roxbury Bank (hereinafter “Bank”) is a secured creditor of Dwight Bair, having a valid, perfected security interest in Dwight Bair’s cattle, machinery and equipment. Dale Bair claims that he has an agister’s and cattle feeding lien of at least \$22,654.80 against Dwight Bair’s cattle, superior to the Bank’s lien on the same cattle. Dale Bair filed an “Agister’s & Cattle Feeding Lien” with the McPherson County Register of Deeds office on February 14, 2002, less than two weeks after Judge Nugent converted the case to a Chapter 7 proceeding. Dwight Bair failed to seek approval from the Court to incur the debt associated with the agister’s lien, and Dale Bair failed to seek relief from the automatic stay to file that statutory lien. According to the lien document, Dale Bair claimed a lien for feeding and care of cattle only from September 15, 2001—the day after the bankruptcy was filed—through February 15, 2002.

In Dale Bair’s answer, he also claims<sup>2</sup> he is owed \$22,654.80 for the care and feed of the cattle, and again, only from September 15, 2001<sup>3</sup> through February 15, 2002, and another \$1,980 for services,

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<sup>2</sup> Although Dale Bair begins paragraphs 12 and 13 of his Answer (Doc. 12) with the phrase “by way of counterclaim” and indicates he is owed certain money for post-petition services to Dwight’s cattle, and should receive a judgment in the stated amount for those services, no proper counterclaim has been filed under Fed. R. Bankruptcy. Proc. 7013. Plaintiff obviously did not understand that this pleading, captioned solely as “Answer of Dale Bair,” somehow constituted a proper counterclaim, as no answer has been filed to any “counterclaim.” If Defendant Dale Bair intended to file a proper counterclaim against the Bank for any remaining issues in this case, he should file a motion to do so under Rule 7013(f).

<sup>3</sup> The lien statement, itself, indicates care was provided to 9 bulls beginning September 15, but care and feeding of cattle was not commenced until a month later, October 15, 2001 for 105 calves, and October 17, 2001 for 67 cows.

labor and supplies between February 15, 2002 and April 1, 2002. At no time in his answer, or any other pleading in this case, does Dale Bair make any claim that he is owed money from Dwight Bair for the care or feeding of his cattle prior to September 15, 2001. This is corroborated by Dwight's Schedule F, which shows Dale Bair with a pre-petition claim of zero. It is also corroborated by Dale's failure to file any Proof of Claim in this bankruptcy and by the fact that the lien document filed by Dale Bair on February 14, 2002 is silent as to any debt prior to September 15, 2001.<sup>4</sup> The deadline for filing any such claims was May 28, 2002.

By affidavit, Dale Bair also claims that "Dwight Bair pastured cattle on land owned by him prior to September 14, 2001" and that "Dale Bair began providing care and feeding for the cattle so pastured prior to September 14, 2001." Again, he does not assert he is owed any money for such pre-petition periods. Further, Dale Bair did not assert a lien for any pre-petition care in the lien documents filed on February 14, 2002. In addition, it appears Dwight Bair paid his father nothing for the care and feeding of his cattle within at least a year prior to Dwight Bair's filing bankruptcy, as Dwight's sworn Statement of Financial Affairs indicates no payment (over \$600) was made to his father, an insider, within a year of filing bankruptcy.<sup>5</sup> Furthermore, Dwight indicated in Schedule G, Executory Contracts and Unexpired Leases, that there were no existing pasture leases at the time of filing, with his father or anyone else. The Court questions whether Dale and Dwight, as father and son, had a previous arrangement whereby Dwight did not have to pay for feed and care provided to Dwight's cattle on Dale's land. The parties' prior financial

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<sup>4</sup> See *In re Applin*, 108 B.R. 253,257 (Bankr. E.D. Cal. 1989) (holding that the judicial notice of basic filings in the bankruptcy case is permissible to fill in gaps in the evidentiary record of a specific adversary proceeding or contested matter).

<sup>5</sup> See Docket 1, Petition and Schedules, Schedule of Financial Affairs, Question No. 3.

arrangement will not be further considered in deciding this case, however, as it is not necessary to the decision.

The first mention of Dale Bair caring for Dwight Bair's cattle prior to September 15, 2001, is found in the above-quoted affidavit by Dale Bair. That affidavit was filed to support his argument that he did not need to first seek relief from the stay to perfect his agister's lien on the cattle because he had possession of the cattle prior to the bankruptcy. The affidavit is particularly unhelpful, however, as it does not refer to the specific cattle that is the subject of this proceeding, and it could be read to indicate that he was caring for cattle completely unrelated to these proceedings, and months or years earlier.

The cattle have been sold and the proceeds from the sale are being held in escrow pending the outcome of this matter. Additional facts will be discussed below, when necessary.

## **II. STANDARD FOR SUMMARY JUDGMENT**

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law."<sup>6</sup> The rule provides that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact."<sup>7</sup> The substantive law identifies which facts are material.<sup>8</sup> A dispute over a material fact is genuine when the

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<sup>6</sup> Fed. R. Civ. P. 56(c), made applicable to adversary proceedings by Fed. R. Bankruptcy Proc. 7056(c).

<sup>7</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

<sup>8</sup> *Id.* at 248.

evidence is such that a reasonable jury could find for the nonmovant.<sup>9</sup> “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.”<sup>10</sup>

The movant has the initial burden of showing the absence of a genuine issue of material fact.<sup>11</sup> The movant may discharge its burden “by ‘showing’ – that is, pointing out to the ... court – that there is an absence of evidence to support the nonmoving party’s case.”<sup>12</sup> The movant need not negate the nonmovant’s claim.<sup>13</sup> Once the movant makes a properly supported motion, the nonmovant must do more than merely show there is some metaphysical doubt as to the material facts.<sup>14</sup> The nonmovant must go beyond the pleadings and, by affidavits or depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial.<sup>15</sup> Rule 7056(c) requires the Court enter summary judgment against a nonmovant who fails to make a showing sufficient to establish the existence of an essential element to that party’s case, and on which that party will bear the burden of proof.<sup>16</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Shapolia v. Los Alamos Nat’l Lab.*, 992 F.2d 1033, 1036 (10<sup>th</sup> Cir. 1993).

<sup>12</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

<sup>13</sup> *Id.* at 323.

<sup>14</sup> *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

<sup>15</sup> *Celotex*, 477 U.S. at 324.

<sup>16</sup> *Id.* at 322.

### III. ANALYSIS

#### A. Agister's Liens in Kansas

The term “agistment” is an ancient one derived from the Germanic word “giest,” meaning guest. The Random House Dictionary of the English Language (1973) indicates agistment is an obsolete word meaning the act of feeding or pasturing for a fee.<sup>17</sup> Agister's liens for the care and pasturing of cattle in Kansas did not exist at common law.<sup>18</sup> In addition, since the agister's lien is created by statute, it is not governed by the Uniform Commercial Code.<sup>19</sup> K.S.A. 58-220 provides a lien to a pasture owner who leases his property for pasture purposes.

K.S.A. 58-220 states, in part:

Any owner of pasture lands, or the trustee or agent of such owner, who shall lease or rent such pasture lands exclusively for pasture purposes to any person, copartnership or corporation for the pasturing of cattle, horses, sheep or other livestock shall have a first and prior lien upon all such livestock or so much thereof as may be necessary to secure the payment of the rent for said pasture land, only, and said lien shall be preferred to that of any prior security interest or other encumbrance and shall be valid irrespective of possession by the owner of such lands, or the owner's trustee or agent: *Provided*, The lessor record a duly verified notice of his or her claim to a lien upon such livestock in the office of the register of deeds in the county where such livestock is pastured prior to the expiration of fifteen (15) days after such livestock is removed from the pasture.

In addition to the lien for pasture owners set forth in K.S.A. 58-220, Kansas has also established a lien in favor of those who care for and feed livestock. K.S.A. 58-207 provides:

The keepers of livery stables, and all others engaged in feeding horses, cattle, hogs, or other livestock, shall have a lien upon such property for the feed and care bestowed by

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<sup>17</sup> *In re Swagerman*, 115 B.R. 540, 547 (Bankr. W. D. Mich. 1990).

<sup>18</sup> *Hermes v. Stackley*, 10 Kan. App. 2d 342, 344 (1985).

<sup>19</sup> *See* K.S.A. 84-9-104(c) and 84-9-310.

them upon the same, and if reasonable or stipulated charges for such feed and care be not paid within sixty (60) days after the same becomes due, the property, or so much thereof as may be necessary to pay such charges and the expenses of publication and sale, may be sold as provided in this act: *Provided, however,* That any lien created by this act may be assigned.

As the plain meaning of the statutes indicate, and as might be expected in a state whose economy is dependent on agriculture, agister's liens are easily obtained, because the statutes allow the supplier of feed, labor, medicine or pasture "to unilaterally impose a lien on farm products to secure payment for the services or feed provided."<sup>20</sup> The theory is that the person who puts value into collateral which inures to the benefit of the owner and secured creditor should be rewarded and protected. Furthermore, as the Kansas Supreme Court has noted in similar agister lien cases, "the mortgagee knows the cattle must be pastured at somebody's expense, so it is altogether just that a lien of equitable precedence over his will arise in favor of the man who pastures the cattle."<sup>21</sup>

#### **B. Dale Bair's agister's lien is not valid.**

The Bank contends that Dale Bair's agister's lien, which is for post-petition services, only, is invalid for two reasons. First, the Bank contends that Dale Bair cannot be treated as a secured claimant on the cattle, because Dwight Bair, as the Chapter 12 Debtor in possession, failed to seek or obtain Court approval to incur this post-petition debt, as required by 11 U.S.C. § 364.<sup>22</sup> The Bank argues that as the only secured creditor on the cattle, it had the right to know where its secured cattle was being pastured and

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<sup>20</sup> Pearson, J., "Kansas Artisan's & Mechanic's Liens: An Unnecessary Tangle," 63 J.K.B.A. 28, 32 (Sept. 1994).

<sup>21</sup> *Freuhauf Trailer Co. v. State Corp. Commission*, 149 Kan. 465, 472 (1939).

<sup>22</sup> All future statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq., unless otherwise specified.

under what terms before its lien would be *de facto* subordinated by unapproved costs associated with the care and feeding of these cattle. Second, the Bank contends that the agister's lien is void, because Dale Bair failed to seek relief from the automatic stay under §362(d) before filing the lien.

Dale Bair responds that he was not required to seek relief from stay in order to perfect his agister's lien, because he had a pre-existing interest in the cattle, prior to the bankruptcy filing, which interest he was allowed to perfect under § 362(b)(3) or § 546(b) . He further argues that because he was already pasturing Dwight's cattle at the time of his filing bankruptcy, that fact excuses Dwight from affirmatively seeking to incur post-petition debt normally required by § 364.

The key to this dispute is whether, at trial, Dale Bair could sustain his burden of proving he held a valid agister's lien for the post-petition services rendered.<sup>23</sup> Admittedly, had Dwight Bair not filed bankruptcy, it appears Kansas law would grant Dale Bair an agister's lien in Dwight Bair's cattle as a result of his providing pasture land, care and feed to Dwight Bair's cattle between September 15, 2001 and April, 2002. But the intervention of the bankruptcy filing changes the parties' duties, as more fully discussed below.

Bair argues that § 362(b)(3) and § 546(b) provide exceptions to the automatic stay, allowing him to perfect his agister's lien, post-petition, without bankruptcy court approval. Section 362(b)(3) provides that the filing of a bankruptcy petition does not operate as a stay

of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of

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<sup>23</sup> See *Hoy v. Griffin*, 137 Kan. 872 (1933) (holding that burden of proof is on the landowners to establish their claimed agister's lien).



this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title.

Section 546(b) provides that

The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that (A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection; or (B) provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation.

This Court finds that neither § 362(b)(3) nor § 546(b) authorized Dale Bair, under the facts of this case, to file the agister's lien, nor, for that matter, do they allow a debtor-in-possession to incur post-petition debt secured by estate property without Court approval, as required by § 364.

Dale Bair cannot rely on § 362(b)(3) or § 546(b), because nothing in the record demonstrates that he had any interest in the cattle prior to September 14, 2001, the date the Chapter 12 petition was filed, that could have been perfected post-petition under § 362(b)(3) nor § 546(b). The Bank notes that the agister's lien filed by Dale Bair on February 14, 2002 made no mention of being owed money for any pre-petition services to the cattle, and that his first mention of any pre-petition interest in the cattle was contained in the affidavit he filed in an attempt to defeat the Bank's current motion for summary judgment. The Bank also notes that Dale Bair made no claim in his Answer for the value of any pre-petition services, instead only asserting amounts are owed to him for the post-petition period between September 15, 2001 and April 1, 2002.

The mere fact that Dale Bair may have provided pre-petition care and feed to unidentified animals is insufficient to establish that he had, or could obtain, a statutory lien in the instant cattle, the perfection of which could be accomplished after the bankruptcy filing and without relief from the stay under § 362(b). That is because in addition to providing the pasturing, care and feed for the cattle, Dwight Bair must have

owed money to Dale Bair for those services in order for Dale to properly assert or obtain a statutory agister's lien against the cattle. Once an agister has been paid for services rendered, the lien upon the cattle is terminated.<sup>24</sup>

Dale Bair never alleges that he is owed money for the services he provided prior to September 15, 2001. Neither his affidavit, his answer, nor the notice of agister's lien he filed with the McPherson County Register of Deed's office, indicate Dale Bair is owed for any pre-petition services. Further, the bar date for asserting such a claim in this bankruptcy expired in May, 2002, and no such claim was made. Without such debt, he is unable to use the purported pre-petition existence of the cattle on his land to justify a post-petition lien under § 362(b)(3) or § 546(b).

Even if he could have somehow perfected a lien without seeking relief from the stay, § 364 requires Court approval before a trustee, or debtor in possession, can incur debt or obtain credit unless the debt is unsecured and incurred in the ordinary course of business. Dwight Bair, in contracting for the care and feed of his cattle by a third party (his father), in exchange for payment in the future to that third party, clearly obtained credit and incurred debt to Dale Bair. There is no factual dispute that Dwight incurred such debt, as Dale Bair is asserting not only that he is owed over \$22,654, but that the debt is secured by a statutory lien on the cattle superior to the Bank's lien.<sup>25</sup>

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<sup>24</sup> *Cf. Birks v. French*, 21 Kan. 238, 246 (1878).

<sup>25</sup> *See Serbus v. First Nat'l Bank of Elbow Lake (In re Serbus)*, 53 B.R. 187, 189 (Bankr. D. Minn. 1985) (holding that Debtor, by allowing grain dealer to store his corn, thus creating a statutory possession lien under Minnesota law, was in fact incurring secured debt).

Before a trustee or debtor in possession can incur such secured debt, however, § 364 requires court approval, following notice and a hearing.<sup>26</sup> The requirement of court approval, following notice and a hearing, serves to protect the interests of existing creditors, especially those such as the Bank, which holds a secured interest in the identical property that is proposed to be used to secure the new debt. The parties have stipulated there was no notice or hearing on this extension of credit, and that the Court did not authorize Dwight Bair to incur the debt.

The amount of any lien on property securing debt obtained during the pendency of a bankruptcy case is limited to the amount of the debt incurred after obtaining court approval.<sup>27</sup> The policy behind this requirement is that the secured creditor is then given an opportunity to object, for example, on the basis that the cattle should instead be immediately liquidated, that the cost for care and feed exceed what the Bank could arrange for the same cattle, or that the person supplying pasture and care is not qualified to perform the services. Since Dwight Bair has no power but that granted to him under the Bankruptcy Code, he was without power to enter into the contract with his father without Court approval, and he was without power to secure the pasture contract by a statutory lien under Kansas law without Court approval. For these reasons, the lien asserted by Dale Bair is invalid, and his actions to perfect the statutory lien violated the automatic stay.<sup>28</sup>

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<sup>26</sup> 11 U.S.C. § 364(c) and (d).

<sup>27</sup> See *In re Bono Development, Inc.*, 8 F.3d 720, 721 (10<sup>th</sup> Cir. 1993).

<sup>28</sup> See *Serbus*, 53 B.R. at 189 (holding that a statutory lien for the post-petition storage of corn cannot be created after a bankruptcy filing without court approval, and that any attempt to perfect statutory lien violates § 362(a)(4)) and *Matter of Faita*, 164 B.R. 6, 9 (Bankr. D. Conn. 1994) (holding that § 362(a)(4) applies to statutory liens, regardless of whether an "act" is required to create or perfect the lien).

At first blush, this seems a harsh result. It is possible that the cattle, once sold, brought a higher price because of the feed and care rendered by Dale Bair, thus directly benefitting the Bank. But it is also possible that, after appropriate notice and a hearing, the Court might have sustained an objection by the Bank that it could obtain better net results in another way. By failing to seek and obtain court permission, Dwight Bair deprived the Bank of its right to have input into this decision.

In addition, this is a result that could have easily been avoided by Dale Bair. The record shows that he received notice of the filing of this bankruptcy by his son, and could have protected his post-petition interest in the cattle by insisting that his son take the necessary, and fairly simple, step of securing court approval under § 364, after notice and an opportunity for a hearing, before agreeing to provide post-petition pasture. Since the bulk of the asserted lien is for feeding cattle after October 15, 2001, the Bairs had over a month to seek permission from the Court. This Court is unable to now protect Dale Bair from his decision not to protect himself.

**C. The cattle are assets of the estate.**

Dale Bair alternatively contends that Dwight was not required to seek permission to have his father extend credit to him under § 364, because the cattle in question were not part of the bankruptcy estate in the first instance. He bases this argument on the allegation that he, Dale Bair, was the bailee and on the basis that the Chapter 7 Trustee has made no claim to the cattle. The Court rejects this argument.

The property of a bankruptcy estate consists of “all legal or equitable interests of the debtor as of the commencement of the case,” including all property “wherever located and by whomever held.”<sup>29</sup>

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<sup>29</sup> 11 U.S.C. § 541(a).

Clearly the cattle, admittedly owned by Debtor Dwight Bair, although held on land owned by Dale Bair, fits within this definition of property of the estate. Furthermore, the fact that the Chapter 7 Trustee has not sought to obtain the cattle for the estate is irrelevant in light of the facts of this case. The Bank filed a proof of claim in this case asserting a debt of \$605,010, secured by collateral worth only \$388,300.<sup>30</sup> Accordingly, it would have been futile for the Trustee to proceed against these assets, given that all proceeds from the sale of cattle by the Trustee would only benefit the Bank.

**D. Dale Bair is not entitled to the benefits of 11 U.S.C. § 506(c).**

Dale Bair suggests that the feeding and pasturing of the cattle was to the benefit of the estate, and to the Bank, and that he should therefore be entitled to recover his money pursuant to § 506(c). Section 506(c) allows the Trustee to recover the reasonable and necessary costs and expenses of preserving, or disposing of, property secured by a lien to the extent of any benefit to the holder of such claim. Dale Bair does not provide any legal support for his claim that a creditor who is a bailee of the debtor-in-possession's property is afforded any rights under § 506(c).

The United States Supreme Court recently held that § 506(c) is only available to the trustee, and a debtor-in-possession who is acting as the trustee.<sup>31</sup> Because Dale Bair is neither the Trustee nor the debtor-in-possession, he is not allowed to assert a claim under § 506(c). The Court will not subordinate the Bank's lien to his claim.

**IV. CONCLUSION**

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<sup>30</sup> See Proof of Claim No. 18.

<sup>31</sup> See *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000).

The Court finds that the Bank is entitled to summary judgment on the issue of whether Dale Bair has a valid agister's lien against the cattle owned by Dwight Bair. Dale Bair's purported agister's lien covers only the post-petition period from September 15, 2001 to February 15, 2002. Dale Bair had no unpaid pre-petition interest in the cattle that would allow him to perfect his agister's lien without seeking relief from the automatic stay. In addition, because Dwight Bair filed for bankruptcy on September 14, 2001, he was required to obtain Court approval before incurring any debt that was secured by an asset of the estate. Dwight Bair's failure to obtain this Court approval invalidates any lien Dale Bair may assert against the estate property. Finally, the Court finds Dale Bair's arguments that the cattle in question are not assets of the bankruptcy estate, or that he is entitled to make a claim under § 506(c) for subordination, to be completely without merit.

**IT IS, THEREFORE, BY THIS COURT ORDERED** that the Roxbury Bank's Motion for Partial Summary Judgment Against Defendant Dale Bair (Doc. 31) is granted, and the sale proceeds from the sale of the cattle being escrowed pending this decision should be released to the Bank. Dale Bair's Agister's and Cattle Feeding Lien filed with the McPherson County Register of Deeds office on February 14, 2002, is invalid and of no effect.

**IT IS FURTHER ORDERED** that because the Bank's Summary Judgment Motion was only partial, as it related to the cattle, certain claims asserted by the Bank in its Complaint may still remain unresolved. The Court sets this matter for a telephonic status conference on **March 17, 2004 at 9:00 A.M.** At that time, the Court will request the parties outline what claims remain unresolved, and will determine if the matter should be set for a final pretrial conference.

**IT IS SO ORDERED** this \_\_\_\_ day of March, 2004.

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JANICE MILLER KARLIN  
United States Bankruptcy Judge  
District of Kansas



**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the Memorandum and Order Granting Motion for Partial Summary Judgment Against Defendant Dale Bair was deposited in the United States mail, postage prepaid on this \_\_\_\_\_ day of March, 2004, to the following:

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